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WHY IT IS THE LAW

By

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WHY IT IS THE LAW

How Johns Hopkins' New Institute Is Picking a Little Path of Light Toward the Knowledge in Which Freedom Lies

GERALD W. JOHNSON

FROM the standpoint of the layman, there are but two really great commentators on the law. There is W. S. Gilbert's Lord Chancellor, who declared:

> "The Law is the true embodiment
> Of everything that's excellent:
> It has no kind of fault or flaw—
> And I, my lords, embody the Law."

And there is Charles Dickens's Mr. Bumble, who declared, "The law is a ass!"

Comparisons, saith Dogberry, are odorous, and few of us have stopped to consider which of the two commentators is more nearly right. Few of us, did I say? Nay, none of us. The seven justices of the United States Supreme Court, who, in the final analysis, make our law, Holmes and Brandeis dissenting, have no exact and reliable data on the subject. As regards a specific statute, brought before it for judgment, the Court can, and does, decide whether it is the true embodiment of everything that's excellent, or merely asinine: but the law as a whole has never been brought before the Court for judgment. Nor has it faced any other tribunal. Congress passes laws, hoping the Supreme Court will let them stand; but it has neither time nor facilities to go back over its work in the past, to consider whether it is good. State legislatures are like Congress, and other courts are like the Supreme Court. Practicing attorneys have enough to do to learn what the law is, and law schools have enough to do in preparing them. Heretofore, it has been nobody's business to find out the facts about the law.

Yet the wide divergence of opinion between Mr. Bumble and the Lord Chancellor is surely not without significance. It is inexact to say that Mr. Bumble is the prophet of defeated litigants. So he is, but he is much more than that. Hardly a day passes without some outcry against the inadequacy of the law to meet the stresses and strains of modern civilization. Oftener than not, this outcry comes from men who have only an impersonal interest in the matter. Not infrequently it comes from men whose position in our society is analogous to that of the Lord Chancellor in England. It was a committee of lawyers with Elihu Root for chairman that reported recently:

"The opinion that the law is unnecessarily uncertain and complex, that many of its rules do not work well in practice and that its administration often results not in justice, but in injustice, is general among all classes and among persons of widely divergent political and social opinions."

A far cry indeed from "It has no kind of fault or flaw;" yet this represents the considered opinion of a group of the ablest practitioners in the country. If they do not concur in Mr. Bumble's decision, it is not because they cherish illusions of the law's perfection, but because they realize that its present inadequacy is not attributable to stupidity in its framers, but to the tremendous changes which the years have wrought in its field of operations.

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The last century has shifted the foundations of the world. As one analyst describes it, "Modern science has suddenly compressed the planet we occupy—jamming together into a single community widely diverse peoples and civilizations;" and in the process many human institutions and practices have collapsed. But there has been no corresponding shift in the bases of the law. No wonder, then, that its failure to fit new conditions becomes more and more apparent.

Courts and legislatures have worked frantically at the task of patching and piecing, but suspicion grows that patching and piecing will never make the ancient system operate satisfactorily in a new world. Still, it remains suspicion only, for neither courts nor legislatures can possibly undertake the task

of a general review of the structure of the law. This is a task for which the ideal endowment is unlimited learning and unlimited leisure, neither of which belongs to courts and legislatures.

However, believe it or not, the task has been undertaken. The men who have set themselves to it lay no claim to limitless learning, but they are especially equipped for the task; and they have been relieved of all other duties to devote themselves to this. They are operating under the authority of an institution of higher learning, the Johns Hopkins University, in Baltimore, where, in 1928, they set up an Institute of Law. This sounds like a law school, but it is in reality anything else. The Institute of Law will never turn out a qualified attorney. In fact, it prefers to have its students qualified attorneys before they enter the Institute, although it will accept, under some circumstances, men or women who have never opened a law-book. Yet it studies the law.

The great gulf between the Institute of Law and the law school of the ordinary type is revealed in a single word. The student in the law school is there to find out what is the law, whereas the student in the Institute is there to find out why it is the law. He is presumed to know beforehand what it is.

But, some one is sure to object that the law schools also teach the theory of law. The whole science of jurisprudence, indeed, is little concerned with specific statutes, save as they serve to illustrate the broad principles underlying legislation. Not mere volumes, but whole libraries, have been written on the subject, and the names most revered by the profession are, almost without exception, those of men who have devoted their lives to the study of the theory of law. Indeed, to assume that a man becomes a lawyer by memorizing the code would be a grotesque insult both to the profession and to the schools. Clearly, the mere substitution of "why" for "what" is drawing a distinction without necessarily establishing a difference.

But establishing the difference is as complicated as drawing the distinction is simple. It involves every characteristic that distinguishes the philosophic from the scientific spirit. It means the difference between inductive and deductive reasoning. It is intimately associated with all those complex changes that have transformed the meaning of the word learning since the time of Descartes.

For the scholar it may suffice to say that the Institute proposes to proceed to the study of the law in the same spirit in which the Johns Hopkins School of Medicine undertook the study of that science forty years ago. But this means nothing much to the average, unscholarly layman, who is unaware of the difference between the Hopkins school and the schools which preceded it. But if one attempts to illustrate by analogy, he immediately opens the way to a variety of fantastic misinterpretations: and the Institute has been in operation only one year, therefore it has as yet supplied no specific instances of its work far enough developed to serve as comprehensible illustrations.

Yet the fundamental difference in method is not hard to understand. The jurisconsult examines a specific statute with reference to the legal principle on which it is based; if it is in conformity with that principle, he then seeks to determine its application by searching for the intent of the framers of the law. With this his labor is finished. In so far as the specific statute conforms to established legal principles and is truly expressive of the intent of the framers, he pronounces it good law. He admits no responsibility for its practical effect; that is the business of legislators.

In other words, the business of the jurisconsult is to read the minds of men. He endeavors to understand, first, what the ancients meant when they enunciated the principle, and, second, what the legislators meant when they undertook to apply it. This process calls into play imagination, insight, intuition, logic, all the powers that are the special equipment of the philosopher.

The legal scientist, on the other hand, would proceed to the same examination by an entirely different method. He would pay scant attention to established principles or the intent of the framers of the law. He would ask two questions, and only two. First, he would inquire, what does society desire this statute to accomplish? Then he would ask, does it do the work? If the answer to the second question were in the affirmative, he would pronounce it good law, although it might be based on no discoverable principle whatever, and monstrously misrepresentative of the intent of the men who wrote it.

Unfortunately, though, it is out of the question for the legal scientist to operate in present-day America, and for a very simple reason—to wit, nobody can answer his second question.

Take any statute that comes to mind and ask yourself the question, does it do the work? It is a thousand to one that you don't know, and that nobody knows. Oh, we all have our impressions, of course; but science learned long ago that nothing in the wide world is trickier than men's impressions of what is going on about them. And when it comes to cold, indisputable facts, we have none.

Prohibition, of course, leaps to mind as the most vivid example. Literally thousands of tons of printed argument have been issued by both sides, but how much of it is worth a fig as scientific proof? For it must be remembered that even a fact is worthless as scientific proof, provided another fact just as good, but pointing the other way, can be produced. And every fact adduced in the prohibition argument on one side can be balanced by another fact on the other. Is our prosperity an argument that prohibition works? Then why is France prosperous? Is the prevalence of crime proof that it doesn't work? Then why did we not have an Eden prior to 1919? Is the decrease in arrests for drunkenness an argument in its favor? Then why is drunkenness markedly decreasing in England?

Even the so-called data that the contestants produce on both sides are largely worthless, because they usually mean one thing in one place, and something altogether different elsewhere. Consider arrests for drunkenness, for example—what does it signify whether they increase or decrease, when no arrests at all may mean a sober population, and may just as well mean worthless police? And what is drunkenness? In one of the Western States recently a clergyman was charged with drunkenness because he had taken a couple of tablespoons of an alcohol-bearing tonic. On the other hand, popular tradition in Baltimore has it that the police test for drunkenness is to lay the suspect down on the floor; if he can continue to lie there without holding on, he isn't drunk.

But the prohibition illustration is conspicuous more because it is a highly controversial topic than because our lack of scientific information as to its results seems unique. We are, however, in the dark as to the practical results of nearly all our laws. We think we observe certain manifestations resulting from their

application, but ordinarily we have no kind of proof that these manifestations are not due to something entirely different. We have, as the scientists put it, no control experiment by which we may test the accuracy of our observations.

This condition presents the gigantic practical problem which faces the Institute of Law and which will prevent it for some time from making any contribution that is likely to impress the layman. It is not merely a matter of gathering facts—for, as the case of prohibition brilliantly demonstrates, a fact is not necessarily valuable simply because it is a fact. It gathers significance only when it is compared with some other fact, and if it isn't comparable, it isn't significant. If a thousand people were arrested in the town of A for drunkenness in 1928 and only five hundred were arrested in the town of B, we have two facts: but we do not know that they possess significance until we know whether the police in B were as active as they were in A, whether the tests for drunkenness were alike and whether the towns had about the same population. If, however, it can be shown that the same police, applying the same tests in the same town, arrested a thousand people one year and only five hundred the next, we have two facts which we may begin to believe are significant, because they are comparable.

This is an extremely simple illustration of the conditions confronting the research student in American law. Multiply many times the difficulties cited in comparing the statistics of arrests for drunkenness, and you may have a faint and sketchy conception of the obstacles the student must overcome before he is able even to begin worthwhile work in the more complicated branches of the law. There is no lack of statistics, heaven knows. There are tons of statistics, and scores of organizations are grinding out more every day. But of statistics that mean anything there is a painful scarcity.

Yet the chaotic nature of the wilderness through which the explorer must pick his way does not represent the first and greatest obstacle that the Institute must surmount. That task involves the construction of reliable instruments for his guidance. The scientists call it devising a technique. In other words, they must decide first, precisely what it is they wish to know, and second, how to get at it.

Consider, for example, a relatively new departure in American criminal law, the provision for permanent restraint of habitual offenders as exemplified in New York's Baumes law. Under this statute, a defendant convicted of a felony for the fourth time must—not may, but must—be sentenced to life imprisonment. Obviously, this is a social experiment of great interest and, potentially, of immense importance. Is the Baumes law doing the work it was intended to do, and doing nothing else that neutralizes its good effects? Every New Yorker, save perhaps scientists and those most intimately acquainted with the practical effects of the law, will answer without hesitation. Unfortunately, though, about half of them say "Yes" and about as many say "No." And, as Mr. Dooley was wont to remark, there y'are.

Well, then, how is one to find out? Give that question an answer which will stand the test of scientific criticism, especially the criticism of statisticians, and the Institute will welcome you with open arms. Once the test is devised, applying it is routine work, requiring mainly time and patience. But devising a technique that is both practical and reliable—in short, really good—is a task for which the most tremendous intellectual endowment is none too great. To expect the Institute to produce such technique promptly is to expect it to perform miracles. Some lines of inquiry, to be sure, it is already carrying on, and many others probably will be developed without much difficulty; but it is idle to hope that it will be able to work out its line of approach to its more abstruse problems without months, more likely years, of intense study marked by failure and rejection of countless ideas.

And this inevitably raises in the mind of the layman the question, "Will it ever succeed completely?"

The answer to this, fortunately, is short, simple and certain. It is, "No."

The Johns Hopkins Medical School has never succeeded completely, and there is no present indication that it ever will. That school was founded in 1892, but people die now just as certainly as they did forty years ago. As far as we are able to judge, they are going to continue to die indefinitely.

But is the medical school to be adjudged worthless simply because it has not attained perfection after forty years' endeavor?

Not by rational people. It has not conquered death, but only the irrational expected it to do so. It would be just as irrational to expect the Institute of Law to discover a process whereby the law may be made a perfect instrument of social control.

However, in 1892 there were those who predicted, not only that the medical school would never conquer death, but that it would never establish medicine on a strictly scientific basis. Healing is essentially an art, said these—and they included many who were regarded as sages at the time But they ignored the fact that architecture also is an art, yet it cannot be practiced successfully without paying the most careful respect to the science of engineering. Healing is, to some extent, an art, but it is supported on the framework of the biological sciences.

The idea that inspired the great quartet, Osler, Halsted, Welch and Kelly, who started the Johns Hopkins Medical School, was simply that too little attention was being paid to the framework. Therefore for forty years the school has concentrated on that. The result has been the production of a relatively small number of healers, but a relatively large number of pure scientists. Now, after forty years, even the layman understands that some of the greatest doctors who have ever lived have never cured so much as one wart. What of it? They have taught a thousand other doctors how to cure. They deserve their fame.

And the school deserves its fame, even though it has not abolished death. Why should not the new Institute also gain fame by performing a similar work, even though it never abolishes the other great certainty, taxes or "makes our earth an Eden like to Heaven above"?

It is undeniable that art never permeated the practice of healing to anything like the extent it has the making and the administration of law. It might be plausibly argued that it is only the third order of histrionic genius that goes into the making of a great actor; the second goes into the making of a great lawyer, whose artistry is of so high an order that it is surpassed only by those supreme geniuses, the great tyrants—Cæsar, Napoleon, Lenin, Mussolini—the colossi of dramatic art. It is a far cry from the methods of a first-rate pleader to the methods of the laboratory; yet this long road must the Institute travel if it is to fulfil the hopes of its founders.

On the other hand, the material with which the legal scientist must deal is infinitely easier of approach than the material of the medical scientist. The law is man-made; its traps and puzzles, therefore, are man-made, and its deepest mysteries are not to be compared for profundity with the obscurity in which Nature has wrapped even as obvious a thing as the malarial plasmodium. To assert that science cannot measure this material is to assert that the eyes which can pick out *micrococcus pyogenes* with a microscope, or with a telescope resolve the spiral nebulæ into individual stars, cannot read a printed page laid before them.

The basic difficulty in this, as in all the social sciences, is not discovery, but verification. David admitted that he was a bit hasty when he said that all men are liars, but he never admitted that he was wrong. He wasn't wrong. All men are liars, and they never lie more fluently and eloquently than when they are making an earnest effort to tell the truth, the whole truth, and nothing but the truth. Who knows this better than a doctor of medicine?

The law is the creation of this errant humanity. Its very substance represents opinions which, in turn, are frequently composed of prejudices and passions. Nowhere does it present a tangible, concrete fact to which the laboratory man can anchor his speculations. True, neither the *bacillus typhosus* nor Betelgeuze is exactly tangible, but the microscope can pick up one and the telescope the other, so their existence is indisputable. In the scientific study of the law, however, most scientific instruments are useless. The microscope, the telescope, the physicist's scales, the chemist's reagents, all are valueless here. Hence the opinion is widespread that the material is too vague, nebulous and uncertain to admit of scientific scrutiny. This does not apply to the law, alone, but to all the social sciences.

Those who cling to this opinion, however, have too narrow a conception of the capacity of scientific method. In general, they are ignorant of one branch of mathematics, which certainly is a science; this branch is statistics, and it supplies an instrument capable of making measurements inconceivable through any other method.

It is largely statistical measurement upon which any scientific student of the law must depend. For the paradoxical truth is

that while all men are liars, mankind does not lie. The unsupported statement of one man, even though he be a bishop, is not to be relied on for a moment as scientific truth; but the statements on the same subject of ten thousand men, even though among them may be a reasonable number of bootleggers, will, in the aggregate, approximate the truth so closely that the factor of error may be disregarded for practical purposes.

I do not mean to say, of course, that if ten thousand different men swear to a specific statement, that specific statement is to be enshrined as scientific truth, but merely that when a statement is supported by so many witnesses we may eliminate the possibility of conscious or even subconscious lying about it. Many times ten thousand men have believed, and said, that the sun goes around the earth without establishing the truth of the statement; but they unquestionably established the truth of their belief. We may continue to question the existence of a personal devil with horns, and a cloven hoof, and a tail, although thousands of persons have sworn that they have seen him. But after their evidence we may no longer question the existence of a widespread belief in the devil; nor may we question the inevitable deduction, that many men are actuated in their conduct by this belief.

The collection of statistical data will open the way to penetration of countless mysteries of the law. The qualification, however, is extremely important—statistics merely open the way, they do not necessarily illuminate the mystery. It is not without significance that the popular gradations of mendacity have evolved into the liar, the dam' liar, and the statistician. In unskilled hands statistics can lead as far away from truth as in skilled hands they can lead toward it. Therefore the ultimate value of any purely statistical study of the law must depend upon the use to which statistics are put after they have been gathered.

This establishes the one condition under which the Institute may hope to do successful work. That condition is the maintenance of the spirit of scientific inquiry to the end of the process. Its statistics may be gathered as carefully as legal statistics are now gathered carelessly. Its technique as regards the collection of data may be worked out so cleverly that no one can

find a flaw in it. But with all this, if the examination of the data should be clouded by emotionalism, or ignorance, or any other element which might dim the cold, northern light of science, the result could easily be a distortion of the truth so gross as to be worse than unadulterated falsehood.

It is for this reason that the projectors of the Institute have carefully disavowed any missionary ambition. They are not out to reform anything. They do not intend, or desire, to work out model statutes. They have not the remotest interest in proving that capital punishment is wrong or right, or that the Torrens system of registration of titles is an improvement or the reverse in real property law, or that garnishment is either a bulwark of civilization or a mask for peonage. It is their task to find out as exactly as human limitations permit what the law, as it exists, is doing; and when they have done that, they are through.

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If legislatures choose to avail themselves of the knowledge gathered by the Institute to frame better statutes in the future, that will, of course, be gratifying; but it is not in any sense part of the work of the Institute. Its business is to study, to learn, and to record its findings. It may furnish the basis for reforms, but it will do no reforming.

And it hopes especially to equip men to carry on the work in other places than the Johns Hopkins University. Well-equipped research students in law are now as scarce as white blackbirds. Half a dozen States are already seeking such men to conduct researches of various kinds—into their judicial systems, into the administration of criminal justice, into a score of different phases of the enactment, the practice and the administration of law. But there is no standard technique of inquiry into such problems, and virtually no research students who have been trained to the work. It is the ambition of the Institute to supply both.

To that end a small number of young men and women will be admitted annually to take part in the work of the Institute. They will be selected carefully, of course, but as a matter of fact the conditions have been made such that men patently unfitted for the work will hardly apply. In the first place, there will be no reward in the shape of a degree. Some of the work

that students will be called on to do may be counted toward a Ph.D., but not by any means all of it. In the second place, the work will not necessarily qualify a man for the practice of the law; on the contrary, it is hoped that there will be a considerable proportion of qualified attorneys among the students. In the third place, the chances are remote that any one connected with the Institute will do any spectacularly brilliant work for some years. There is too much tedious spade-work to be performed before anything can be achieved that is likely to attract the attention of the general public.

Only to students with a genuine love of learning can this prospect have much appeal.

But to such men the appeal is strong indeed, for the program of the Institute opens fields of learning that are virtually without limit. The moment the law is defined as an instrument of social control, the whole wide world becomes its field of operation. Yet no narrower definition will hold, for every one understands that the statutes do not comprise the law. Judges make as much law as legislators. The ten departments at Washington all issue rulings that are as binding as the enactments of Congress. Such extra-departmental agencies as the Interstate Commerce Commission, the Federal Trade Commission and the Federal Reserve Board are the source of regulations which affect all of us in the most intimate fashion. The Bar Association and the Medical Association make decisions upon points of practice which, as far as their professions are concerned, are as binding as a statute formally upheld by the Supreme Court.

The result is that if one is to examine all this body of law, he must range into fields never touched by the writer of law texts. The actual effect of a ruling of the Federal Trade Commission, for example, depends not in the least on what Coke or Blackstone thought about the principles and precedents on which the ruling is established, but altogether on the operation of economic forces which are ordinarily extremely complex, and hardly understood even by the trained economist. The effect of such a statute as the Baumes law depends, not upon key cases and constitutional provisions, but upon the reaction of the habitual offender to the threat of life imprisonment, which is a matter that the best psychiatrist cannot determine offhand, if, indeed, he can determine it after a life-time of study.

The law, in short, operates in every field of human endeavor, and he who would know the law must know mankind. It is not without significance, therefore, that every man on the faculty of the Institute has at some time in his career distinguished himself in a subject other than the law.

The faculty is presided over, of course, by the president of the university, Joseph S. Ames, who happens to be a physicist. In addition it comprises, at present, four full professors. Walter Wheeler Cook was professor of law in Yale up to 1928, but he began his career as an assistant in mathematics in Columbia, and later taught history and political science at the University of Nebraska. Leon Carroll Marshall is not a scholar in law at all, but an economist, who was Director of Economics and Business at Chicago University before coming to the Hopkins. Herman Oliphant, late professor of law at Columbia, taught English early in his academic career. Hessel Edward Yntema taught political science at the University of Michigan before he started the career that brought him to the chair of Roman Law and Comparative Jurisprudence at Columbia, whence he came to the Hopkins. And the next man to be added, according to present plans, is not to be a lawyer, but a psychiatrist, an anthropologist, or sociologist.

Under these circumstances the layman naturally asks, who is to set bounds to this thing? What is to prevent the Institute of Law from spinning out of any reasonable orbit and wandering off into infinite space, seeing that the whole field of knowledge lies open before it?

The answers to these questions are fit to appall the authoritarian. No one sets any boundaries. Nothing restrains the Institute, save the native intelligence of the faculty that controls it, and the traditions of a university which has not hitherto been much given to encouraging nonsense. Theoretically, it is entirely possible for this organization to waste itself in arrant futilities and gassy generalizing.

But theoretically it was possible for the medical school to do the same thing forty years ago. No effort was made to restrict it to the practicalities of the moment; on the contrary, it was invited to pursue its researches into whatever remote corner of the field of science they might lead. Yet if this freedom afforded any temptation to turn to the production of alchemists

and metaphysicians, that temptation has been pretty successfully resisted. If there exists anywhere on earth to-day a group of harder-boiled realists than the members of the Johns Hopkins Medical School, it would be interesting to know where they are.

The factor in the equation which the layman frequently fails to take into account is the extremely exigent nature of scientific method. Here is a boundary that is a boundary indeed; here is a restriction far more effective than the most rigid set of rules imposed by outside authority.

The Institute of Law is, indeed, free of the whole field of knowledge, but it may not cover that field by speculation. It may not don syllogistic seven-league boots and leap wildly from premise to conclusion. It is committed to a slow, plodding progress from fact to fact. It may formulate brilliant hypotheses, but it may not accept them as established by formulation; it must check and re-check them until they are verified beyond a reasonable doubt before it may even consider what follows.

It is easily possible that adherence to this method may lead to some results that are unexpected, and that may strike the outside world as fantastic; but it is entirely impossible, adhering to this method, to lose contact with reality. The chances are that the burden of such criticism as may be leveled against the Institute in the near future will be, not that it goes too fast and too far, but that it is not getting anywhere: for the accretion of facts by which the scientist works toward his goal is often so slow as to be imperceptible to the impatient layman.

So the apparent freedom from restraint of the Institute means no more than that it is free from artificial restraints imposed from without. Its charter of freedom is the old charter of freedom of the human mind established two thousand years ago, but too simple and too magnificent ever to have been grasped except by the finest minds of the race: "Know the truth, and the truth shall make you free."

To assert that the Institute is free now would be to assert that it already knows the truth; and of this its very existence is a denial. All that it claims, all that it hopes, is that it is "picking a little path of light" toward the knowledge in which freedom lies.

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